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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 550.

INTERNATIONAL HARVESTER COMPANY; PHILLIPS PETROLEUM COMPANY; SEALRIGHT-OSWEGO FALLS CORPORATION et al.,
Petitioners,

vs.

CITY OF KANSAS CITY, KANSAS; ROBERT J. FOSTER, County Attorney of Wyandotte County, Kansas, et al.,
Respondents.

BRIEF AMICUS CURIAE OF WILLIAM M. FERGUSON, ATTORNEY GENERAL OF THE STATE OF KANSAS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

WILLIAM M. FERGUSON,
Attorney General of the State of Kansas.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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Believing it is his duty to maintain the laws of his state, William M. Ferguson, Attorney General of the State of Kansas, files this brief *amicus curiae* in opposition to the petition for a writ of certiorari filed by the International Harvester Company *et al.*

STATEMENT.

The petition now under consideration is another chapter in a long standing struggle between the City of Kansas City, Kansas, and property owners in the Fairfax Industrial District, lying just outside the city limits. The city desires to annex the district, a part of which is the city's airport, while owners of property in the industrial district resist annexation. The district has few if any residents and the businesses therein are commercial or industrial in character. For more than thirty-five years, these property owners have enjoyed the advantage of proximity to a flourishing city, yet without being subjected to city taxes. Twice in protracted litigation the opponents of annexation prevented extension of the city boundary. In the last of these two cases[1] the Supreme Court of Kansas clarified the meaning of the statutory language, "whenever any unplatted land lies within (or mainly within) any city",[2] holding that the quoted phrase meant that "a common perimeter of more than fifty per cent" is essential to valid annexation.

In 1958 the city passed new ordinances in compliance with the above decision, and these new ordinances were again attacked by a new action commenced in the name of the state on the relation of the then County Attorney of Wyandotte County, Kansas,[3] against the city and its governing body, and oddly enough, Quindaro Township, within whose boundaries the industrial district was located. But while nominally a defendant, the township, represented by the local firm which represents the present petitioner,

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1. *State ex rel.* v. *Kansas City*, 181 Kan. 870, 876, 317 P.2d 806.

2. G.S. 1949, 13-1602.

3. *State ex rel.* v. *Kansas City*, 186 Kan. 190, 350 P.2d 37.

assumed the part of a plaintiff against its co-defendant, the city and its officers. During the pendency of this action two of the petitioners[4] herein, along with others, sought leave to intervene, being represented by the same local firm which now appears for these petitioners.

After full hearing, the Supreme Court of Kansas dismissed the case upon the motion of the Attorney General, who had superseded the County Attorney. The Court held that neither Quindaro Township nor the interveners could challenge the annexation since annexation involved the corporate limits of the city, a matter which could be raised only by the state through its proper officers. Thereupon, the present petitioners, Phillips Petroleum Company and Sealright-Oswego Falls Corporation, with other interveners, petitioned this Court for a writ of certiorari, which was denied.[5]

In March, 1961, the present petitioners commenced this action in the United States District Court for the District of Kansas, asking for a declaratory judgment that the annexation ordinances were invalid, and to enjoin their enforcement, and for an order directing the defendant County Attorney to institute a *quo warranto* action. Answers for three of the defendants having been filed, the city moved for judgment on the pleadings. The trial court dismissed the action and the complainants appealed to the Circuit Court of Appeals for the Tenth Circuit. That Court, however, affirmed the judgment of the trial court[6] and denied a petition for rehearing.[7] It is to review this judgment that the present petition for certiorari has been filed.

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4. See Petition, p. 4, footnote 1.

5. *Girten Investment Company* v. *State ex rel.*, 363 U.S. 831, 4 L. Ed. 1525.

6. Petition for Certiorari, Appendix A2-7.

7. *Ibid*, Appendix B2.

ARGUMENT.

I.

The Issue Stated.

On page 3 of the petition, it is said that two questions are presented, the first being whether federal courts can adjudicate federal constitutional claims when state law prevents their adjudication in the state courts.

The second question said to be presented is lacking in clarity. It begins by looking backward to some other annexation ordinances which have been declared invalid. It then looks forward to subsequently adopted ordinances which it assumes are "additional and similar" to the former invalid ordinances and stultified by the same defects. Then a further element is added: disposition of a challenge to the validity of these later ordinances otherwise than on the merits through a dismissal by state officers, dubbed "admittedly arbitrary action", although who made such an admission is not stated. Finally we reach the question which is whether all this denies equal protection of the laws to property owners "who would be adversely affected" thereby.

However, on page 16 of the petition the questions here involved are more simply stated, where it is said:

> "—the gravamen of petitioners' complaint here, namely, that by being denied a hearing anywhere on their state law contentions, they are being deprived of federal rights—the right to be heard and the right to be free from a discrimination that lacks any rational basis."

But even this better statement will bear some clarification, particularly with regard to the right to be heard. None of the owners of property in the Fairfax District was, or could properly be, a party in the case of *State ex rel. Foster* v. *City of Kansas City*. Although the pendency of that action was well known, none of the petitioners made any effort to enter that case except Phillips Petroleum Company and Sealright-Oswego Falls Corporation. Surely these other petitioners cannot very well complain that they were denied a hearing in the Kansas Supreme Court.

But how about Phillips Petroleum and Sealright-Oswego Falls? Both joined with the Union Pacific Railroad and Girten Investment Company in an application to be permitted to intervene and in the brief filed by the interveners. Furthermore, they joined with Girten Investment Company in a petition for a writ of certiorari and the brief supporting it. Certiorari being denied, they, with the other petitioners, filed the complaint in the present case and were heard by the trial court on the question of dismissal; and then on appeal they filed briefs and argued the case in the Circuit Court of Appeals. Their complaint is not that they have not been accorded the right to be heard, but rather that they have not been permitted to try the specific issue they want to try, that is, whether the annexation ordinances were invalid, as they claim. Doubtless many another litigant has been similarly disappointed.

Perhaps the essence of the whole controversy is simply this: Have petitioners been denied due process and equal protection by a requirement of state law that annexation ordinances may be challenged only by the state acting through its proper officers, when such officers decline to bring or maintain such action?

II.

The Petitioners Have Not Been Denied Due Process.

Petitioners concede the applicability of the law of Kansas by their statement on page 16 of their petition in the sentence preceding the excerpt above quoted. It is there stated:

> "It is of course true that the merits of the underlying controversy depend entirely on state law."

The trial court and the Circuit Court of Appeals did apply Kansas law, but petitioners criticize the Court for failing to decide the merits and ignoring the gravamen of petitioners' complaint.

The essentials of due process are notice and opportunity to be heard. Surely petitioners cannot claim that they were denied the right to be heard in the district and circuit court of appeals, in each of which courts their whole complaints were set forth in arguments and in briefs. Both courts decided against petitioners and they now complain that because they were not permitted to try the validity of the annexation ordinances, they were denied the right to be heard on that phase of the case.

Apparently petitioners' contention springs from a belief that due process requires the Court not only to hear but also to decide upon every legal problem a litigant may choose to inject into a case. But the orderly administration of justice does not require the Court to indulge every desire of the litigant, nor are they obliged to jump over essential preliminary steps in order to reach the question the litigant may wish to have tried. To do so would often compel the Court to deal with abstractions rather than with realities; whereas, courts are instituted to afford relief only to those persons whose rights have been invaded.

So in every case the plaintiff must show himself possessed of a legally recognized right before the Court can go further.

Absent such a right a plaintiff is not entitled to proceed to try what he deems to be the main issue in the case. As this Court has said:

> "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action, he must show that he has sustained, or is in immediate danger of sustaining a direct injury as the result of that action, and it is not sufficient that he has merely a general interest common to all members of the public."[8]

There is nothing novel about this. The books are full of cases where plaintiffs have failed because of some defect in the preliminary steps of the case—for want of jurisdiction, improper venue, or because the right asserted belonged to someone other than the plaintiff. Yet plaintiff has had his opportunity to be heard and cannot claim a denial of due process merely because of an adverse ruling on a preliminary matter.

Nor is it a denial of due process if state law bars the door of the courts to some would-be litigants. For example, the statute of frauds provides that "no action shall be brought whereby to charge a party upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith . . ." (G.S. 1949, 33-106). Although this rule may result in hardship in some cases, yet it stands

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8. *Ex parte Albert Le Vitt*, 302 U.S. 633, 82 L. Ed. 493.

as a matter of public policy to prevent fraud. If this prohibition, as long as it has stood upon the statute books, constitutes a denial of due process, generations of able lawyers have failed to catch the point.

Similarly the law of Kansas authorizes actions to test the validity of annexation ordinances only when brought by the County Attorney or the Attorney General, thus preventing such actions by property owners in the annexed area. This, too, is a matter of public policy,[9] for annexation involves the corporate limits and the corporate existence of the city. Certainly it is not in the public interest that cities and their governing bodies should be continually harassed by unnecessary and ill-founded litigation.

Nor does this restriction work undue hardships upon owners of property in the annexed area. It is not a taking of their property, and at bottom, most of the resistance is because of unwillingness to be subjected to city taxes. This point of view ignores the fact that most of the value of the annexed property arises from its proximity to a large and growing city. But subjection of the annexed area to city taxes is not a valid defense to annexation. A fairly recent comment of this Court points out that the due process clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a state's exercise of its political powers.[10]

Actions testing the validity of annexations must, in Kansas, be brought in the name of the state to uphold its laws and not to serve the purposes of owners of property in the annexed area. Indeed, in the absence of statute,

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9. *Smith* v. *Emporia*, 168 Kan. 187, 190 P.2d 101.

10. *Gomillion* v. *Lightfoot*, 364 U.S. 329, 81 S. Ct. 125, 5 L. Ed. 2d 110.

the state's legal representatives have no authority to assume, in the name of the state, the burden of conducting an action in behalf of private individuals.[11] Hence, if petitioners have some right in themselves to maintain this action, then their criticism of the County Attorney and Attorney General is uncalled for. But as a matter of public policy, the state has withheld from private parties the right to challenge annexation. The trial court and the Circuit Court of Appeals so held, and hence the petitioners found themselves out of court before they could try the issues they wanted to try. This did not constitute a denial of due process, and the petition now in hearing should be denied.

III.

Petitioners Have Not Been Denied Equal Protection of the Laws.

The petitioners contend that their constitutional rights have been violated in that they have been denied equal protection of the laws. This claim has or may be intended to refer to two different situations, the first of which relates to the Kansas law limiting the right to question the validity of annexation ordinances to actions by the state on the relation of the County Attorney or the Attorney General.

The equal protection clause does not require that all persons be treated exactly alike: It only requires that there be equality of protection to all persons who are similarly situated. The general class of which petitioners are members is that of property owners whose properties are brought into a city by annexation. The limitation on the right to attack annexation as above stated certainly applies

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11. *Dreyer* v. *Siler*, 180 Kan. 765, 308 P.2d 127; *State ex rel.* v. *Mills*, 171 Kan. 397, 233 P.2d 720.

to all property owners in the annexed area. Petitioners cannot say that they are in any different position than other property owners in the annexed area; hence, petitioners' rights have not been discriminated against in favor of other property owners.

Nor can petitioners claim that the permission given exclusively to the state's law officers denies to them equal protection of the laws. As heretofore stated, when such actions are brought, the purpose of the suit is to vindicate the law of the state and not to protect the interest of any property owner in the annexed area. The state is not in any similar circumstance with the property owner, and petitioners cannot equate themselves with the state. The sovereign state has many rights and many powers which the individual citizen cannot appropriate to himself.

Of course the classification or division made by the law must not be capricious or arbitrary, but must rest on a difference which bears a substantial and reasonable relation to the persons affected by it. We think that a sound and rational relation exists for permitting the state to inquire into the boundaries and corporate existence of a city, and denying that privilege to property owners in the annexed area.

The rule in question has as its basis not only prevention of a multiplicity of suits, but also the stronger reason of the public welfare in that to permit indiscriminate attacks upon corporate existence at the whim of any dissatisfied person would hinder the effective administration of government. Hence, as a matter of public necessity, and not from any desire to injure, the rule has been adopted that only the state, through its proper representatives, may bring actions affecting annexation to municipal entities created by the state for the purposes of local government.

If the claim of denial of equal protection be referred to the action of the former Attorney General in causing dismissal of *State ex rel. Foster* v. *Kansas City,* petitioners are in no better position. In that case,[12] the Court held that in deciding whether a particular situation merited challenge by the state, the County Attorney or Attorney General acted as officer of the Court, restricted in his conduct by the canons of ethics. Hence, if he was not convinced of the illegality of the annexation, it was not only his right, but his duty to discontinue that action. In so doing he exercised his official discretion, which neither the property owner nor the Court could control. Being convinced that the ordinances in question conformed to the Court's definition of "within (or mainly within)", he did the only honorable thing he could do, that is by dismissing the case. The Court approved his action, and neither the defendants in that case nor the present petitioners have any lawful ground of complaint.

We contend that petitioners have failed to show any sufficient ground for their petition for certiorari and that the Court should deny the same.

Respectfully submitted,

WILLIAM M. FERGUSON,
Attorney General of the State of Kansas.

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12. *State ex rel.* v. *Kansas City,* 186 Kan. 190, 350 P.2d 37.